IN THE

# Supreme Court of the United States

October Term, 1977
No. 77-397

ROBERT R. SCOTT, dba SLICK NICK'S,

*Appellant,*

*vs.*

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

*Appellees.*

**On Appeal From the Court of Appeal of the State of California**

## BRIEF FOR THE APPELLEES

EVELLE J. YOUNGER, *Attorney General of the State of California,*

MARILYN K. MAYER,
*Deputy Attorney General,*

800 Tishman Building,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 736-2258,

*Attorneys for Appellees.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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## BRIEF FOR THE APPELLEES

APPELLEES DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA AND ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD move to dismiss the instant action on the following grounds:

1. Appellant has failed to raise a substantial federal question;

2. The issues raised by appellant has been expressly decided by this court; and

3. The case is moot.

## Questions Raised

1. Has the decision in *California v. LaRue* (1972) 409 U.S. 109 [34 L.Ed.2d 342, 93 S.Ct. 390] retained validity after *Craig v. Boren* (1976) 429 U.S. 190 [50 L.Ed.2d 397, 97 S.Ct. 451]?

2. May a state forbid holders of on-sale alcoholic beverage licenses from presenting non-obscene nude dancing that does not violate any law?

3. Should this court decide a moot question?

## Statement of the Case

By an Accusation dated July 30, 1975, appellant was charged with three counts, all occurring on May 16, 1975, of permitting persons on the on-sale licensed premises to display their breasts, buttocks, and pubic hair to the view of patrons, which entertainers were on a stage not removed at least six feet from the nearest patron. It was charged that the continuance of the above-designated license would be contrary to public welfare and morals within the meaning of Article XX, section 22 of the Constitution of the State of California, and Business and Professions Code section 24200(a), in that on or about May 24, 1974, appellant was issued an alcoholic beverage license subject to the following conditions:

> "That the petitioner [appellant herein] shall not permit the following conduct or, acts upon the licensed premises:
>
> "(1) Employ or use any person in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below



> the top of the aerola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals.
>
> "(2) Employ or use the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in paragraph (1) above.
>
> "(3) Encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.
>
> "(4) Permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.
>
> "(5) Permit any person to perform acts of or acts which simulate:
>
> "(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which was prohibited by law.
>
> "(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.
>
> "(c) The displaying of the pubic hair, anus, vulva or genitals.
>
> "(6) Subject to the provisions of subdivision (5) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.
>
> "(7) Permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"(8) Permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"(9) Permit the showing of film, still pictures, electronic reproduction; or other visual reproduction depicting:

"(a) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals.

"(c) Scenes wherein a person displays the vulva or the anus or the genitals.

"(d) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above."

That in violation of the above recited conditions and on or about May 16, 1975, appellant did permit an unidentified female dancer, whose first name is known as "Nichole," and is described as follows: female Caucasian, approximately 5'5" tall, 120 pounds, has dark brown hair, and is approximately 25 years old, and Bonnie Lou Dorothy Davis to perform acts in the above designated on-sale licensed premises at which time said persons did display their pubic hair, and did permit said entertainers to expose their breasts, buttocks, and pubic hair to the view of patrons in the above designated on-sale licensed premises, at which time and place said entertainers were not on a stage removed at least six feet from the nearest patron.

The prior licensing history of appellant alleged that a disciplinary action dated March 21, 1975, was pend-



ing hearing for a violation of section 25607 of the Business and Professions Code and section 647(f) of the Penal Code.

All of the above acts were alleged to be in violation of Article XX, section 22 of the California Constitution and section 24200(a) of the Business and Professions Code as to all counts. It was further alleged that a violation of section 23804 of the Business and Professions Code occurred as to Count IV and that violations of Title 4 of the California Administrative Code rule 143.3(1)(c) occurred as to Counts I and II, and rule 143.3(2) as to Count III.

On or about September 26, 1975, a First Amended Accusation was filed wherein it was alleged that appellant had committed the same violations as alleged in the first Accusation. Said First Amended Accusation further alleged six additional counts which occurred on August 21, 1975, wherein the appellant allowed various performers in the above designated on-sale licensed premises to display their pubic hair, breasts, and buttocks at which time they were on stage not removed at least six feet from the nearest patron. Count X of the First Amended Accusation incorporated the same provisions of Count IV of the first Accusation but further alleged the following acts:

A. On May 16, 1975, did permit an unidentified female dancer, whose first name is known only as "Nichole," and who is described as follows: female Caucasian, approximately 5'5" tall, 120 pounds, has dark brown hair, and is approximately 25 years old, and Bonnie Lou Dorothy Davis to perform acts in the above-designated on-sale licensed premises at which time said entertainers did expose their breasts, buttocks, and pubic hair

to the view of patrons in the above-designated on-sale licensed premises at which time and place said entertainers were not on a stage removed at least six feet from the nearest patron.

B. On August 21, 1975, did permit Patricia Louise Trammell and Kathleen Mary Ryan to perform acts in the above-designated on-sale licensed premises at which time said persons did display their pubic hair, and did permit said entertainers to expose their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises at which time and place said entertainers were not on a stage removed at least six feet from the nearest patron.

C. On August 28, 1975, did permit Patricia Louise Trammell and Joan Irene Gaudet to perform acts in the above-designated on-sale licensed premises at which time said persons did display their breasts, buttocks, and pubic hair to the view of patrons in the above-designated on-sale licensed premises at which time and place said entertainers were not on a stage removed at least six feet from the nearest patron.

The license history of appellant stated that a disciplinary action was filed on March 21, 1975, for a violation of Business and Professions Code section 25607 and section 647(f) of the Penal Code and was awaiting a decision.

The above acts were alleged to be in violation of Article XX, section 22 of the California Contitution and sections 24200(a) and (b) and 23804 of the Business and Professions Code, and that there were violations of Title 4, California Administrative Code rules 143.3(1)(c) and 143.3(2).



After hearing, the Administrative Law Judge found that:

A. Appellant violated rule 143.3(1)(c) as to Counts I, II, IV, V, VII, and VIII.

B. The appellant violated rule 143.3(2) as to Counts III, VI, and IX.

C. Grounds for the suspension or revocation of appellant's license were established pursuant to subdivisions (a) and (b) of section 24200 of the Business and Professions Code and Article XX, section 22 of the California Constitution as to Counts I through IX.

D. That no cause for discipline was established as to Count X.

The Administrative Law Judge recommended that the license be suspended for 30 days on each Counts I through IX, separately and severally, said suspensions to run concurrently for a total suspension of 30 days. The Administrative Law Judge dismissed Count X. On or about May 20, 1976, the Department of Alcoholic Beverage Control adopted the decision of the Administrative Law Judge. Appellant filed a Notice of Appeal from the decision of the Department of Alcoholic Beverage Control.

On or about March 21, 1976, appellee Alcoholic Beverage Control Appeals Board filed its opinion affirming the order of suspension of the Department of Alcoholic Beverage Control.

Appellant filed a Petition for Writ of Review and Stay in the Court of Appeal of the State of California, Second Appellate District, on April 20, 1977. On April 28, 1977, the petition was denied without opinion. On May 5, 1977, appellant filed a Petition for Writ

of Review and Stay Order in the Supreme Court of the State of California. On May 26, 1977, a hearing on said matter was denied. On or about June 14, 1977, appellee Department of Alcoholic Beverage Control issued an order advising appellant that the Department of Alcoholic Beverage Control would call on him on or after June 24, 1977, to pick up the license certificate inasmuch as the appeals were now final. A copy of the Notice After Appeals Board Decision is attached hereto in the Appendix marked Exhibit "A".

**Statement of the Facts**

John Ellis Schillin, special investigator for the Department of Alcoholic Beverage Control, went to the licensed premises on May 16, 1975, accompanied by Investigator Griffin. Investigator Schillin saw several signs relating to entertainment as follows: "Slick Nick's Saloon, Continuous Dancing, Continuous Entertainment, Beer, Food, Pool;" and outside on the parkway of the premises there was a portable sign that stated, "Exotic Nude Dancing, 5:00 p.m. to 1:00 a.m."

Investigator Schillin arrived at approximately 6:45 p.m. Investigator Schillin was alone when he entered. Investigator Schillin was met by the doorman who requested a $2 admission charge which he paid the doorman. Investigator Schillin then entered the premises and took a seat at the northwest corner of the premises. Approximately 20 patrons were in the premises, 15 of which were seated around the stage. The patrons were observing the dancers on the stage and consuming what appeared to be beer. The doorman plus three bikini-clad waitresses and appellant were present. (R.T. 5-7.)



The stage was approximately 10 by 15 wide and a foot and a half high. There is a bar that separates the patrons from the stage which is approximately two and a half feet wide. There were overhead red dome lights, floodlights over the stage, the stage was well lit. A bikini-clad waitress approached Investigator Schillin at which time he ordered a beer. At that time, there was a dancer on the stage who was totally nude and who was identified as Nichole. Nichole was dancing totally nude; her breasts and pubic area were fully exposed to view. Investigator Schillin observed Nichole dancing for five to ten minutes, at which time she would come within three to six feet of the patrons seated around the stage. After Nichole exited the stage, she was replaced by a bikini-clad dancer who did not remove any of her clothing. (R.T. 7-8.)

After the second dancer left the stage, the first dancer reappeared clad in a mini-skirt and blouse with a black G-string. At the end of the first song, she removed her blouse and mini-skirt, leaving her breasts fully exposed to the patrons' view. She danced in this manner for a few more songs and between the fifth and sixth songs, she went behind a curtained area. She reappeared fully nude with her bare breasts and pubic hair fully exposed to patrons' view. She danced clad in this manner for approximately five more songs and then exited the stage. On approximately five occasions, she came within three to six feet of the patrons that were seated around the stage. She exposed herself for approximately 20 minutes. (R.T. 8-9.)

Another dancer known as Bonnie Lou Dorothy Davis then entered the stage clad in a brown mini-skirt, a

printed blouse, a beige bra, and knee-high boots. At the end of the first song, Davis removed her blouse and at the end of the second song, she removed her bra leaving her breasts fully exposed to patrons' view. Davis danced this way for several songs and then reentered the stage fully nude with the exception of knee-high boots; her bare breasts and pubic hair were fully exposed to view. Davis danced this way for approximately 25 minutes and came within three to six feet of the patrons seated around the stage on approximately seven or eight occasions. (R.T. 9-10.)

At this time, Investigator Barnes and Supervisor Grummell entered the premises and identified themselves to appellant. Investigator Schillin also identified himself to appellant and indicated that he wished to speak to Davis whom he had observed dancing. Appellant escorted Investigator Schillin and Supervisor Grummell to a dressing area at which time Davis related that she was employed by an agency named Foxy Lady located in Fullerton, California. Davis stated that she received $11 per hour to dance nude and that she was paid through the agency or directly by appellant; that she had received instructions from appellant regarding her dancing bottomless and was told not to bend, stoop. squat, kick or touch her body, nor to perform any lewd acts while dancing bottomless. Davis was aware of rule 143 of the Department of Alcoholic Beverage Control, but assumed the premises was aware of it and just followed their instructions. Davis did not believe she was violating the law. Davis additionally stated that she was aware that she was not to go within six feet of the patrons. Supervisor Grummell asked appellant if appellant was aware that permitting



bottomless dancing was in violation of rule 143 and of the conditions of his license. Appellant stated that he was aware of those rules and further stated that his attorney was handling the matter. Investigator Schillin left the premises at approximately 9:10 p.m. (R.T. 10-12.)

Investigator Schillin returned to the premises on August 1, 1975, at approximately 5:40 p.m. Investigator Schillin was accompanied by Investigator Barnes and saw the same signs that he had previously seen. Investigators Schillin and Barnes met appellant at the door and advised appellant that they were conducting an investigation of possible rule 143 violations on appellant's premises. Appellant stated that he would help in any way that he could. The lighting and visibility were the same on this occasion as previously described. Approximately 15 patrons were on the premises, nine of whom were seated around the stage and appeared to be drinking beer. At this time, appellant, the doorman, two waitresses, and a barmaid were present. Investigator Schillin observed two female dancers, Patricia Louise Trammell, who was totally nude, and a Kathleen Mary Ryan clad in a full-length purple gown. Ryan exposed her breasts to the patrons' view, and eventually appeared totally nude. Both women continued dancing for approximately 20 minutes. Then Trammell exited the stage, leaving Ryan alone. Trammell came within approximately three to six feet of the patrons on approximately four occasions, Investigator Schillin asked appellant if he could interview Trammell. Trammell stated that she was employed by the Foxy Lady agency in Fullerton, California, and that she received between $6 and $9 an hour, depending on whether she danced bottomless, topless, or bikini-clad; that she also works

for other places. Trammell had received instructions from appellant regarding her dancing bottomless and was told not to bend, stoop, squat, or kick. Trammell was aware of rule 143 of the Department of Alcoholic Beverage Control, but did not believe that the dancing was in violation of the law. Ryan was also contacted at the end of her performance by Investigator Barnes at which time Investigator Schillin was present. Investigators Barnes and Schillin left the premises at approximately 6:45 p.m. (R.T. 12-16.)

On August 28, 1975, at approximately 6:40 p.m., Investigator Schillin went to the licensed premises again, at which time he saw the same signs as previously described. Investigator Schillin was again accompanied by Investigator Barnes. The lighting and visibility was approximately the same as they were previously described. Investigators Schillin and Barnes informed appellant that they were conducting or continuing the rule 143 investigation. Appellant again stated that he would assist them if he could. Investigators Schillin and Barnes observed Patricia Trammell and Joan Irene Gaudet dancing on the stage totally nude with their bare breasts and pubic hair exposed to view. Gaudet would come within four to six feet of the patrons while she was dancing on approximately four occasions. The performances they saw were substantially the same as what Investigator Schillin had previously seen. Investigator Schillin had an interview with Gaudet who stated that she was employed by the Foxy Lady agency in Fullerton, California, received $32 for each four-and-one-half hour shift, and that she was paid directly by the agency. Gaudet stated that she had the same instructions from appellant, to wit: not to bend, stoop, or squat while dancing bottomless and also that appellant had told her to be totally nude by the end of the sixth song and to remove her G-string behind the curtain on the stage. Gaudet stated that she was aware of the Department of Alcoholic Beverage Control's rule 143, but figured that the premises knew about it and she had just followed the instructions of the premises. After the interview, Investigator Schillin again saw Trammell dancing for approximately ten minutes totally nude. Trammell came within four to six feet of the patrons. Investigator Schillin left the premises at approximately 7:00 p.m. While Investigator Schillin was there, he observed approximately 15 patrons who appeared to be consuming beer. There were also two bikini-clad waitresses and a barmaid. (R.T. 16-20.)



On May 16, 1975, Investigator Schillin had seen Trammell clad only in her black G-string at which time she bent down on the stage in a push-up position and undulated her torso simulating sexual intercourse. To the best of Investigator Schillin's recollection, that was the only time he saw the dancers violate appellant's instructions. At that time only the top portion of Trammell's body and breasts were exposed. Investigator Schillin stated that the entrance fee was approximately $1 on both August 21 and 28, 1975. On May 16, 1975, Investigator Schillin observed Nichole pick up dollar bills at the end of her performance at which time she would bend over to retrieve them. At the conclusion of the performance, Nichole was totally nude, her bare breasts and pubic hair exposed to the patrons' view. Nichole would come within three feet of the patrons. Investigator Schillin also observed Bonnie Lou Dorothy Davis on May 16, 1975, perform the same acts at the end of her performance, except

that she had knee-high boots, but otherwise was totally nude with her bare breasts and pubic hair fully exposed to the patrons' view. Investigator Schillin recalled that four patrons had placed dollar bills on the stage for Davis to retrieve. Davis came within approximately three feet of the patrons. The patrons could lean over the bar counter with their bodies and come close to the stage. The pubic regions of the dancers were at the approximate level of the patrons seated around the stage. (R.T. 26-28.)

Edward J. Grummell, supervising special investigator for the Department of Alcoholic Beverage Control, stated that the records for the licensed premises indicated it had an on-sale beer license known as a type 40. The license was issued on May 24, 1974, and it had continuous conditions placed on it.

Supervisor Grummell entered the licensed premises at approximately 8:45 p.m. on May 16, 1975, with Investigator Barnes. Supervisor Grummell saw Investigators Lloyd Griffin and John Schillin in the licensed premises. Upon entering, Supervisor Grummell identified himself to the doorman and asked to speak to appellant. Appellant was seated on one of the seats facing the stage, at which time a dancer known as Bonnie Louise Davis was dancing nude on the stage. Supervisor Grummell advised appellant that they wished to conduct a rule 143 violation inspection. Supervisor Grummell was then joined by Investigator Schillin who proceeded to interview Davis, while Supervisor Grummell interviewed appellant. Supervisor Grummell asked appellant if appellant was aware of the 143 rules pertaining to bottomless entertainment and the conditions that were placed on his license. Appellant said that he thought he was running a theater. Supervisor



Grummell asked appellant if he felt he was in violation of the conditions placed on his license; appellant said that he discussed it with his attorney who stated that he felt an accusation would be filed against appellant's license because of the activity or entertainment. Supervisor Grummell then asked appellant what instructions he gave to the entertainers. Appellant pointed to a handprinted sign on the wall which gave specific instructions as to what time the dancers were to dance clothed and then nude. Appellant stated that the entertainment started at approximately 5:00 p.m. and that a $2 admission charge was requested if dancers were performing at that time; appellant charged approximately $1.25 for a bottle of beer and $2.50 for a pitcher of beer. Appellant indicated that he hired the dancers through an agency known as the Foxy Lady and at that time hired them for two-and-a-half-hour shifts. Appellant would hire four to six girls per shift and paid $11 per hour to the agency. Appellant would have his own employees, clad in bikini-style outfits, dance during the time the agency girls took their break. Supervisor Grummell left the premises at approximately 9:00 p.m. (A.T. 39-42.)

Lloyd Griffin, special investigator for the Department of Alcoholic Beverage Control, was also at the licensed premises on May 16, 1975. Investigator Griffin entered alone at approximately 6:50 p.m. and observed Investigator Schillin there. Investigator Griffin ordered a beer and paid $1.25 for same. There were approximately 25 patrons at the premises and approximately 15 were seated around the stage area; the others were seated at the bar. The seats around the stage were approximately two to three feet away. The closest Investigator Griffin ever saw a performer on the stage come to

any patron was approximately three feet. At first, Investigator Griffin observed two girls dance in bikini-style bathing suits. After they exited, Investigator Griffin observed two other dancers dance nude exposing their breasts, pubic hair, and buttocks. The closest these dancers would come to the patrons was between three to four feet. Basically, Investigator Griffin described the same activities as the prior witnesses had. Investigator Griffin saw both dancers pick up currency from the stage and bend over completely nude. At this time, one of the dancers would be about three feet from the patrons. Investigator Griffin then called Supervisor Grummell who arrived at the premises with Investigator Barnes at approximately 8:45 to 9:00 p.m. Investigator Griffin left the premises at approximately 9:20 p.m.

Leslie Eugene Barnes, special investigator for the Department of Alcoholic Beverage Control, was in the licensed premises on May 16, 1975, August 21, 1975, and August 28, 1975. Investigator Barnes described the events that occurred in the same manner as had previously been testified to. The chairs which were around the bar next to the stage were approximately two feet from the bottom of the bar counter. The stage is about one foot below the bar counter and extends a portion about to the middle of the counter underneath. Investigator Barnes observed patrons seated in the chairs. On both August 21 and August 28, 1975, Investigator Barnes again observed patrons sitting around the bar and observed dancers exposing their breasts, buttocks, and pubic hair while performing on the stage. On August 21, 1975, Investigator Barnes observed Trammell and Ryan come within three feet of the patrons, walk next to the bar counter



with their shins almost touching the bar counter and grab-hold. On August 28, 1975, Investigator Barnes observed approximately 15 patrons drinking beer and saw Gaudet and Trammell dancing nude on the stage. On approximately 20 occasions, Gaudet came within three feet of the patrons that were seated around the bar counter. Some of the patrons were seated with their elbows on the counter, had their arms on the counter, and were drinking beer. (R.T. 57-64.)

**Defense**

Robert Richard Scott was the proprietor of the licensed premises known as Slick Nick's. The premises had been licensed since May 1974. Since that time, appellant had been presenting entertainment. When appellant first opened he just had bikini dancers for about two months. Appellant started the completely nude entertainment in approximately April 1975. Prior to presenting nude entertainment, appellant installed theater seats, erected a turnstile for admittance, and posted a sign outside stating what type of entertainment there was. The stage around the bar was completely rebuilt with respect to where the customers would sit. The bar was widened to three feet; the seats were installed to measure six feet from the inside of the bar area. At the time they went bottomless, they began to charge an admission fee. It was appellant's intent when making these changes that the operation of the premises would be similar to a theater. Appellant had an entertainment license for 1974 and 1975 issued by the County of Los Angeles. A sheriff brought appellant a copy of a Los Angeles ordinance approximately one week prior to September 19, 1975. Sheriffs had been on the licensed premises from April 1975 to September 1975, during

which time nude entertainment was presented, but no arrests or citations had been issued. Since September 1975, no arrests or citations had been issued. Appellant had given instructions to employees as to their conduct on the premises. (R.T. 75-83.)

Appellant was aware of the Department of Alcoholic Beverage Control's rule against bottomless nude dancing and nude dancing on a licensed premises. Appellant was further aware of the condition on his license. Seats around the bar are approximately eight feet from the edge of the bar. Some of the customers lean forward on the bar with their bodies. Appellant presently offers nude entertainment on the premises. (R.T. 84-85.)



## ARGUMENT

### I

### The Case Is Barred by Mootness

One of the longstanding principles in the law is that the Supreme Court will not give an advisory opinion which cannot affect the litigant. As is evidenced by Exhibit "A" attached hereto, the decision of the Department of Alcoholic Beverage Control (hereinafter sometimes referred to as the "Department") became effective on June 24, 1977. Therefore, it is apparent that this case is barred by the doctrine of mootness.

In *Kletzing v. Young* (D.C. Cir. 1954) 210 F.2d 729, the court held that where a civil service register had expired the case was moot inasmuch as there was no case in controversy. The *Kletzing* court stated at page 730 that, "[T]he legal question appellant seeks to raise may recur in the future does not defeat the defense of mootness. (Citation omitted.)"

Again, in *St. Pierre v. United States* (1943) 319 U.S. 41, 42 [87 L.Ed. 1199, 63 S.Ct. 910] the court held that where a prisoner's sentence was over, there was no longer a subject matter on which the court could operate. The court stated:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. [Citations omitted.] . . ."

The instant case is very similar to the *St. Pierre* case. Since the sentence has been served, in no way can the dates be restored to appellant. Therefore, the case is barred by mootness.

Appellant has a state remedy. If a further action is taken against appellant's license by the Department,

appellant has a remedy before the Alcoholic Beverage Control Appeals Board (hereinafter sometimes referred to as the "Appeals Board") to review the matter before the case becomes final. During the time that the Appeals Board has the case on appeal, there is an automatic stay of the decision. In light of the fact that appellant has a review prior to the case becoming final, it is again submitted that the doctrine of mootness applies. For these reasons, this court should refuse to issue an advisory opinion in this case.

## II
## ABC Rule 143.3 Is Constitutional

As noted by this court in *California v. LaRue* (1972) *supra,* 409 U.S. 109, 110, the Department of Alcoholic Beverage Control is an administrative agency vested by the California Constitution with the authority for the licensing of the sale of alcoholic beverages in California and further has the authority to suspend or revoke any license when the Department determines that its continuation would be contrary to public welfare or morals. Art. XX, § 22 Cal. Const. Further, in the *LaRue* case, this court upheld the validity of rules 143.3 and 143.4.

In *LaRue,* the court specifically discussed the First and Fourteenth Amendments which are also raised in the instant case. This court stated at page 114 that:

> "The state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink. . . .



> "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. . . ."

After a lengthy discussion of the Twenty-first Amendment on page 115, the court in *LaRue* stated that the argument for upholding state regulations in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment.

In citing *United States v. O'Brien* (1968) 391 U.S. 367, 376 [20 L.Ed.2d 672, 88 S.Ct. 1673], this court in *LaRue* further discussed the First and Fourteenth Amendments at length stated:

> " 'We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' " *California v. LaRue, supra,* at pp. 117-18.

The court in *LaRue,* at pages 118-19, stated that:

> "The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that Cali-

fornia has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

". . . But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

"The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution."

These are the very rules that are challenged in this case. This court correctly determined that the state has a legitimate interest in preventing certain conduct from occurring in liquor establishments.

The case of *Craig v. Boren* (1976), 429 U.S. 190, relied on by appellant is inapplicable in this case. In *Craig*, the issue was sex discrimination between females of 18 years of age and males of 21 years of age. Females were allowed to buy 3.2 percent near beer at the age of 18 while males could not do so until they reached the age of 21. Certainly,



this denial of a basic fundamental right to equal protection based on sex and age is held to a higher constitutional equivalent than a performance of nude dancing that is not protected by the First Amendment.

This court held in *Craig*, at page 197, that statutory classifications which distinguished between males and females are subject to scrutiny under the equal protection clause. The court stated:

> "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. . . ."

Certainly, in this case, there is no discrimination as to gender. In fact, this court, in *LaRue*, held that the type of dancing prohibited by these rules is not under the protection of the First Amendment. Thus, *Craig v. Boren, supra,* does not apply in the instant case. Further, this court went on to state that:

> "It is true that California v. LaRue, 409 U.S. 109, 115 (1972), relied upon the Twenty-first Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication,' id., at 118. Nevertheless, the Court has never recognized sufficient 'strength' in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause. . . ." *Craig v. Boren* (1976) *supra*, 429 U.S. 190, 207.

From the above quote in this court's decision in *Craig*, it is clear that this court was reaffirming the

statement in *California v. LaRue* (1972) *supra,* 409 U.S. 109, that the state has authority to regulate live entertainment in liquor establishments under the Twenty-first Amendment where such performances partake more of gross sexuality than of communication. The invidious discrimination apparent in *Craig* is certainly not apparent in this case. The acts prohibited herein are exactly those acts that "partake more of gross sexuality than of communication."

Additionally, there is no denial of the equal protection clause in this instance. All liquor establishments are treated equally and rule 143.3 applies to both males and females. Therefore, no sex-based discrimination can be found in this case.

The *LaRue* court pointed out that the rule (143) focused on the context of licensing bars that sell liquor by the drink, and that the Department had properly concluded that such nude dancing and entertainment cannot take place simultaneously with the consumption of alcoholic beverages. These rules were again upheld in the United States Court of Appeals, Ninth Circuit, in the case of *Richter v. Dept. of Alcoholic Beverage Control* (9th Cir. 1977) 559 F.2d 1168. In *Richter,* the court specifically discussed rule 143.3, which among other things, prohibits the displaying of the pubic hair, anus, vulva, or genital area, and the simulation of intercourse at a liquor establishment. The *Richter* court, at page 1171, cited *Craig v. Boren's* decision and proceeded to distinguish it by stating as follows:

> "However, the language in LaRue, supra, 409 U.S. at 118, 93 S.Ct. at 397, clearly states that the Court did sanction a limitation upon where performances of the type described in the regulation could be held even though it recognized that some of those performances would be within the scope of the First Amendment protections."



The *Richter* court further stated at page 1172 that:

> "Indeed, Mr. Justice Rehnquist, the author of the LaRue opinion, in another case involving regulation of topless dancing, described the holding of LaRue in the following manner:
>
> " 'Although the customary "bar room" type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue, 409 U.S. 109, 118, [93 S.Ct. 390, 397, 34 L.Ed.2d 342] (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In LaRue, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that *a state could therefore ban such dancing as part of its liquor license program.*' [Emphasis added.]
>
> "Doran v. Salem Inn, Inc., 422 U.S. 922, 932-33, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975). See also opinion of Judge Rehnquist in City of Kenosha v. Bruno, 412 U.S. 507, 515, 93 S.Ct. 2222, 2227, 37 LEd.2d 109 (1973): 'We also held [in California v. LaRue] that regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances were facially constitutional.' "

The *Richter* court went on to fully discuss the First Amendment rights involved. The court stated, at page 1172 that:

> "First Amendment rights are indirectly related, but only in the sense that they cannot be freely exercised in certain locations, specifically in the context of the commercial exploitation of both the expression delineated in the regulations, which may be protected by the First Amendment, and the sale of liquor, which is within the state's power to control. Nude dancing, as the type performed in appellant's establishment, is not the subject of the prohibition, rather it is the sale of alcoholic beverages."

The *Richter* court concluded by holding that a state could regulate the places where liquor is served on the basis of the type of entertainment provided, so long as the state proceeds in a reasonable manner and has a rational basis for its enactments.

Further, appellant's reliance on the California case of *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 8 [95 Cal.Rptr. 329, 485 P.2d 529] is inapplicable. In *Sail'er Inn* the issue was whether or not females could be barred from being bartenders. This case involved the same invidious sex discrimination as did *Craig v. Boren* (1976) *supra,* 429 U.S. 190. There the California court held that there was no rational basis to exclude females from being bartenders and therefore overturned the Department's rule due to the sex discrimination in employment. However, unlike the *Sail'er Inn* case, if appellant's dancers were to dance within the confines of rule 143, they would be able to pursue their lawful profession. In *Sail'er Inn,* by



the mere fact of being female, a person could not pursue her lawful profession.

The California courts upheld rule 143 in *Locker v. Kirby* (1973) 31 Cal.App.3d 520 [107 Cal.Rptr. 446]; thus the California courts have also continued to correctly uphold this court's decision in *LaRue,* as has this court in *Doran v. Salem Inn, Inc.* (1975) 422 U.S. 922, 932-33 [45 L.Ed.2d 648, 95 S.Ct. 2561, 2568].

**Conclusion**

For the foregoing reasons, the instant appeal should be dismissed.

Respectfully submitted,

EVELLE J. YOUNGER, *Attorney General of the State of California,*

MARILYN K. MAYER,
*Deputy Attorney General,*

*Attorneys for Appellees.*

## EXHIBIT A

### Notice After Appeals Board Decision

Before the Department of Alcoholic Beverage Control of the State of California.

In the Matter of the Accusation Against Robert R. Scott, Slick Nick's Saloon, 13065 E. Valley Blvd., LaPuente, on-sale beer conditional license, respondent under the Alcoholic Beverage Control Act. File 64421, Reg. 3998.

The Alcoholic Beverage Control Appeals Board having affirmed the decision of the Department of Alcoholic Beverage Control in the above matter and the Supreme Court having denied hearing therein, the decision of the Department dated May 20, 1976 is now final.

A representative of the Department will call on you on or after June 24, 1977 to pick up the license certificate.

Sacramento, California

Dated: June 14, 1977

C. E. Cameron, Jr.
C. E. CAMERON, JR.
CHIEF COUNSEL